

**SOUTH CAROLINA PUBLIC SERVICE COMMISSION**

**HEARING OFFICER DIRECTIVE**

**DOCKET NOS. [2017-370-E, 2017-207-E, 2017-305-E](#) ORDER NO. 2018-83-H**

**JULY 12, 2018**

David Butler  
Hearing Officer

**DOCKET DESCRIPTION:**

**Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans**

**Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent**

**Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920**

**MATTER UNDER CONSIDERATION:**

**Protective Order, Issued Pursuant to Order No. 2018-74-H**

**HEARING EXAMINER ACTION:**

Whereas, the June 25, 2018, Hearing Officer Directive (Order No. 2018-74-H) (as clarified by Commission Order No. 2018-461) determined that a protective order should govern the treatment of confidential and proprietary information produced by Defendant/Respondent South Carolina Electric & Gas Company (“SCE&G”) to Complainants/Petitioners Friends of the Earth and Sierra Club , a Party or Parties in the above-captioned matter currently pending before the Public Service

Commission, and confidential and proprietary information produced by SCE&G to Parties other than Friends of the Earth/Sierra Club in the present Dockets, if they so choose (with the exception of the Office of Regulatory Staff (or "ORS")), the Hearing Officer herein issues the required protective order with terms as stated below. This Hearing Officer holds that confidential information may also be possibly requested from Dominion Energy, and that this Order also binds Dominion Energy with regard to the matters stated herein, as well as SCE&G. This Order is intended to bind Friends of the Earth/Sierra Club as a Party or Parties, and any other Parties to the Dockets that may elect to receive confidential information from SCE&G or Dominion Energy in these Dockets, except for the Office of Regulatory Staff. The term "Party" or "Parties" also includes SCE&G and Dominion Energy in sections describing the duties in the handling of confidential information.

1. **Scope of Protected Material.** All confidential documents produced in the course of discovery, all confidential responses to discovery requests, all confidential deposition testimony and confidential deposition exhibits, and any other confidential materials which may be subject to production, disclosure, or discovery in the above-captioned matter (hereinafter collectively "documents") shall be subject to this Order as set forth below. The protections conferred by this Order also cover (1) any confidential information copied or extracted from confidential documents; (2) all hard and electronic copies, excerpts, derivations, summaries, or compilations of confidential documents; and (3) any confidential testimony, conversations, or presentations by Parties or their counsel that might reveal Protected Material as

defined herein below. “Documents” shall be understood to include, but not be limited to, any written, printed, typed, recorded, photographic, or other graphic matter of any kind or nature, and all mechanical and electrical sound recordings and any transcripts thereof, and computer data files or electronic storage methods in the possession, custody, and/or control of a Party in any manner and/or by any media, whether oral, visual, or in tangible form (including, without limitation, documents, devices and computer readable media) and any and all copies thereof.

- a. **General Protections.** Except as provided in paragraph 4 below, confidential documents produced in the above-referenced proceeding shall not be used or disclosed by the Parties, or counsel for the Parties, or any other persons identified in paragraph 4 below for any purposes whatsoever other than preparing for and conducting the above-captioned proceeding or the proceedings in Docket Nos. 2017-207-E, 2017-305-E and 2017-370-E (collectively, the “Proceedings”), including any appeal of the Proceedings. The parties shall not disclose Protected Material, as defined herein below, to any persons other than the parties, counsel for the Parties and any other persons identified below (paragraph 4).

2. **Form and Timing of Designation.** Disclosure or discovery material that qualifies for protection under this Order must be clearly so designated. Designation in conformity with this Order requires:

- a. **Documents.** Confidential documents shall be so designated by placing or affixing the word “CONFIDENTIAL” on each page of the document that contains Protected Material in a manner which will not interfere with the legibility of the document. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents.
  - i. Inadvertent or unintentional production of documents without prior designation as CONFIDENTIAL shall not be deemed a waiver, in whole or in part, of the right to designate documents as CONFIDENTIAL as otherwise allowed by this Order.
- b. **Testimony.** Portions of depositions or other proceedings shall be deemed CONFIDENTIAL only if designated on the record before the close of the deposition or other proceeding or within seven business days after receipt of the transcript by all Parties. Such designation shall be specific as to the portions to be protected.

- c. **Non-Documentary/Testimonial Information.** For information produced in some form other than documentary/testimonial and for any other tangible items, the designation CONFIDENTIAL shall be affixed in a prominent place on the exterior of the container or containers in which the information or item is stored.

3. **Documents That May Be Designated Confidential.** A Party may designate documents as CONFIDENTIAL (“Protected Material”) but only after in good faith determining that the documents contain information meeting the definition of CONFIDENTIAL as described herein. The information contained in the Protected Material shall be treated no differently than the documents themselves and shall not be disclosed or used in a manner inconsistent with this Order.

- a. **Designation as Confidential.** Documents may be designated as “CONFIDENTIAL” if they contain (a) information protected from disclosure by law, (b) information protected from disclosure pursuant to a contractual obligation, or (c) sensitive information, trade secrets, confidential research or development information, confidential commercial information, confidential internal rate methodologies, confidential accounting documents, confidential technical documents, confidential project management methodologies, confidential

commercially sensitive pricing information, confidential intellectual property rights, confidential financial information, trade secrets as defined under common law and S.C. Code Ann. § 39-8-20(5), confidential know-how, confidential plans, confidential methods, confidential processes, confidential feasibility documents, confidential planning documents, confidential marketing documents, confidential evaluative material and documents, confidential documents and information related to competition, confidential customer information and data, confidential strategic business plans, or other proprietary business information or non-public information the disclosure of which (whether separately or in conjunction with other information being produced) has the potential for causing harm to the designating Party or giving a competitive advantage to others. Matters of general scientific knowledge or matters generally known within an industry may not be designated as CONFIDENTIAL

**4. Access to and Use of Protected Material.**

**a. Limited Third-Party Disclosures.** Confidential Information provided pursuant to this Protective Order may be disclosed without prior written

consent only to the following persons, only in prosecuting this Proceeding, and only to the extent necessary to assist in prosecuting this Proceeding:

(1) Counsel of record representing a Party in this Proceeding and any legal support personnel (*e.g.*, paralegals and clerical employees) employed or engaged by such attorneys, *pro se* litigants, and employees, officers, or directors of a Party.

(2) Consultants or experts retained by a Party, Individuals who become reviewing representatives under this paragraph may not use the Confidential Information made available in this proceeding to attain a competitive advantage over any other Party.

(3) The Commission or its staff.

(4) Court reporters, stenographers, or persons operating audio or video recording equipment at hearings or depositions.

(5) Any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.

(6) Persons noticed for depositions or designated as witnesses, to the extent reasonably necessary in preparing to testify or for the purpose of examination in this Proceeding.

(7) Subject to Section 7 below, a court, regulatory agency, or other government body of competent jurisdiction when compelled by such court, agency or government body.

(b) Persons obtaining access to Confidential Information under this Protective Order shall not disclose information designated as Confidential Information to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than in prosecuting this Proceeding before the Commission or any arbitrator appointed by this Commission. Each individual who is provided access to Confidential Information pursuant to sections (a)(2), (a)(5), or (a)(6) of this paragraph, must first sign, and have notarized, a statement affirmatively stating that the individual has reviewed this Protective Order and understands and agrees to be bound by the limitations it imposes on the signing Party. The form of the notarized statement to be used is attached as Attachment A to this Protective Order.

- a. **Control of Documents.** Counsel for the Parties shall take reasonable efforts to prevent unauthorized disclosure of Protected Material pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents, along with the originals of the forms signed by those



persons required by this Order to sign such forms, acknowledging their obligations under this Order.

- b. **Copies.** All copies, duplicates, extracts, summaries, calculations, computations, notes, analyses, or descriptions (hereinafter referred to collectively as “copy” or “copies”) of Protected Material under this Order or any portion of such a document, shall be immediately affixed with the designation “CONFIDENTIAL” if the word(s) does not already appear on the copy. All such copies shall be afforded the full protection of this order.

5. **Filing of Protected Material.** In the event a Party seek to file any material that is subject to protection under this Order with the Commission, that Party shall take appropriate action to insure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the Party who designated the document as confidential; (2) where appropriate (*e.g.*, in relation to discovery and evidentiary motions), submitting the documents solely for *in camera* review; or (3) where the preceding measures are not adequate, using any method consistent with any rules established by the South Carolina Rules of Civil Procedure or by the Commission. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the Party seeking to submit the document to the Commission shall first consult with counsel for the Party who designated the

document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion.

**6. Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

- a. The burden of proving the necessity of a CONFIDENTIAL designation remains with the Party asserting confidentiality.
- b. A Party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the Party who affixed the designation of the specific basis for the challenge. The Party who so designated the documents shall have seven (7) days from service of the written notice to determine if the dispute can be resolved without intervention and, if not, to move for an Order confirming the CONFIDENTIAL designation. The Party contesting the designation must meet and confer promptly with the Party making the designation, and the Parties must make a good-faith effort to resolve the dispute before seeking intervention. The Parties may agree among themselves to an extension of

the 7-day deadline set forth herein, provided they are engaged in an effort to resolve the dispute.

c. Notwithstanding any challenge to the designation of documents as CONFIDENTIAL, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

- i. the Party who claims that the documents are CONFIDENTIAL withdraws such designation in writing;
- ii. the Party who claims that the documents are CONFIDENTIAL fails to move timely for an Order designating the challenged documents as CONFIDENTIAL as set forth herein; or
- iii. the Commission or Hearing Officer rules that the documents should no longer be designated as CONFIDENTIAL information.

d. Challenges to the confidentiality of documents may be made at any time.

Unless a prompt challenge to a confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the Proceedings, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

7. **Third-Party Protected Material.** If a Party seeks the production of information or documents from a person or entity not a Party to this Protective Order (a “Third Party”), the requesting Party shall provide the Third Party with a copy of this Order. Upon signing Attachment A to the Order—and thereby agreeing to be bound by its terms—the Third Party shall have the same rights and obligations as the Parties with respect to the designation of Protected Material.

8. **Protected Material Subpoenaed or Ordered Produced in the Proceedings or Other Litigation.** A Party in possession of documents or information designated by another Party as CONFIDENTIAL pursuant to the terms of this Order shall provide to the designating Party prompt notice and a copy of any request it receives for such Protected Material prior to the Party’s obligation to produce the requested Protected Material and within three calendar days of receiving the request. Such requests include but are not limited to subpoenas, discovery requests in other litigation, or court orders in the Proceedings or other litigation. The Party who designated the information as CONFIDENTIAL shall respond within five (5) calendar days of being notified of the request regarding whether the information requested continues to be Protected Material and whether the designating Party intends to oppose the request or order for disclosure in accordance with any governing law.

9. **Unauthorized Disclosure of Protected Material.** Violation of the terms of this Order, including, but not limited to, the unauthorized use or disclosure of Protected Material, may result in any such penalties or sanctions deemed appropriate by the Commission, the Hearing Officer, or a Court of competent jurisdiction. Any Party who has reason to believe that a Party receiving Protected Material has used or disclosed the Protected Material for purposes other than preparing for and conducting these proceedings shall first attempt to meet-and-confer with the Party deemed in violation of this Order. If the Parties are unable to resolve their dispute, the designating Party shall provide notice to the Commission or Hearing Officer of the dispute.

10. **Inadvertent Production of Protected Material.** The inadvertent or unintentional disclosure by any Party of Protected Material, regardless of whether the information or document was so designated at the time of disclosure, shall not be deemed to be a waiver in whole or in part of the Party's claim of confidentiality, either as to the specific information or document disclosed or as to any other information or document relating thereto on the same or related subject matter.

- a. In the event a Party inadvertently fails to designate as CONFIDENTIAL certain information that the Party deems is otherwise qualified for such protection, the Party may make such a designation at any time, and up to

five (5) days prior to a scheduled hearing in these proceedings, by notifying the other Parties in writing and providing such Protected Material with the proper marking. In the event a Party does designate information as Protected Material pursuant to this paragraph, the other Parties are not deemed in violation of this Order for disclosing information before it is designated as Protected Material.

**11. Privileged Materials.**

- a. **Privilege Log.** When a Party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, that Party must comply with the requirements SCRCP 26(b)(5)(A), including production of a privilege log.
  - i. If a Party disputes a claim of privilege or protection as trial preparation material, that Party shall notify the withholding Party in writing of the specific information or documents the Party contends should be produced. The Parties shall then meet and confer regarding the challenged information or documents within fourteen (14) days after receipt of the written notice by the withholding Party. The Parties may agree among themselves to an extension of the 14-day deadline set

forth herein, provided they are engaged in an effort to resolve the dispute.

- ii. If the Parties are unable to resolve the dispute following their meet-and-confer, or if the withholding Party refuses to engage in a meet-and-confer before the deadline, the challenging Party may submit to the Commission a motion to compel production. The withholding Party will have fourteen (14) days from the filing of the motion to file a response, and the challenging Party will have seven (7) days from the filing of the response to file a reply in support of its motion

- b. **Inadvertent Production of Privileged Materials.** If any Party produces in discovery information subject to a claim of privilege or protection as trial preparation material, the Parties shall act in accordance with the SCRCP 26(b)(5)(B). Any inadvertent disclosure of privileged information or documents shall not be deemed to be a waiver in whole or in part of the Party's claim of privilege.

**12. Duration of Order and Disposition of Materials at End of Proceedings.**

- a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the proceedings unless otherwise agreed or ordered.

- b. **Return of CONFIDENTIAL Documents.** Within thirty (30) days after the conclusion of the proceedings, including conclusion of any appeal, all documents treated as CONFIDENTIAL under this Order, including copies, shall be returned to the producing Party unless: (1) the document has been entered as evidence or filed (unless introduced or filed under seal); (2) the Parties stipulate to destruction in lieu of return; or (3) as to documents containing the notations, summations, or other mental impressions of the receiving Party, that Party elects destruction.
- i. Conclusion of the Proceedings shall be deemed the later of (1) a final order from the Commission that disposes of all of Complainants' remaining requested relief; and (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, or reviews of these proceedings including the time limits for filing any motions or applications for extension of time pursuant to applicable law. Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such



archival copies that contain or constitute Protected Material remain subject to this Order as set forth in paragraph 12.a.

**13. Order Subject to Modification.** This Order shall be subject to modification on motion of a Party or other Party to the Proceedings who may show an adequate interest in addressing the scope and terms of this Order, or by the Commission or Hearing Officer. The Order shall not, however, be modified until the Parties shall have been given notice and an opportunity to be heard on the proposed modification.

**14. No Commission Determination.** This Order is entered based on the representations and agreements of the Parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a determination that any specific document or item of information designated as CONFIDENTIAL is subject to protection under any applicable regulation, SCRCP, or otherwise until such time as a document-specific ruling shall have been made.

**15. Right to Assert Other Objections.** By stipulating to the entry of this Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Order.

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**16. Professional Responsibility.** Rule 407, South Carolina Appellate Court Rules, Rules of Professional Conduct, Rule 3.4 states, in part, as follows:

**“A lawyer shall not:**

.....

**(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;”**

This Rule obligates attorneys appearing before a tribunal to follow the instructions of that tribunal. In this case, the Orders of the Hearing Officer are an extension of the tribunal, so attorneys participating in these Dockets are bound by the Code of Professional Responsibility to obey Hearing Officer Orders, including this one.

**17. Use and Effect of Order.** Parties electing to be bound by the provisions of this Order for the receipt of confidential documents shall notify the Hearing Officer. If any documents determined to be confidential are presented at the hearing on the merits of these Dockets, Parties other than ORS must have either elected to be bound by the terms of this Order or must have signed confidentiality agreements to remain in the hearing room when such confidential documents are discussed in the open hearing. Other than ORS, Parties that have not chosen either option will be

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asked to vacate the hearing room during hearing discussions involving confidential documents, unless they immediately execute a confidentiality agreement, or immediately agree in writing to be bound the terms of this Protective Order.

**18. Non-Applicability.** This Protective Order does not apply to the Office of Regulatory Staff or any information and documents received by ORS, as per S.C. Code Ann. Section 58-4-55 (A) (as amended, June 27, 2018). Further, ORS need not execute a confidentiality order or agree to be bound by the terms of this Protective Order to remain in the hearing room during discussion of confidential documents during the hearing.

End of Order

ATTACHMENT A

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA**  
**DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E**

**In Re:** Friends of the Earth and Sierra )  
Club, Complainant/Petitioner v. )  
South Carolina Electric & Gas )  
Company, Defendant/Respondent )

**In Re:** Request of the South Carolina )  
Office of Regulatory Staff for Rate )  
Relief to SCE&G Rates Pursuant to )  
S.C. Code Ann. § 58-27-920 )

**In Re:** Joint Application and Petition )  
of South Carolina Electric & Gas )  
Company and Dominion Energy, )  
Inc., for Review and Approval of a )  
Proposed Business Combination )  
between SCANA Corporation and )  
Dominion Energy, Inc., as May Be )  
Required, and for a Prudency )  
Determination Regarding the )  
Abandonment of the V.C. Summer )  
Units 2 & 3 Project and Associated )  
Customer Benefits and Cost )  
Recovery Plan. )

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**PROTECTIVE ORDER**  
**ATTACHMENT**

**ACKNOWLEDGEMENT OF UNDERSTANDING  
AND AGREEMENT TO BE BOUND**

The undersigned hereby acknowledges that he or she has read the Protective Order dated July 12, 2018, in the above captioned action, understands the terms thereof, and agrees to be bound by such terms. The undersigned submits to the jurisdiction of the Court in matters relating to the Protective Order and understands that the terms of said Order obligate him/her to use Protected Materials designated CONFIDENTIAL solely for the purposes of the above-captioned proceedings, and not to disclose any such confidential information to any other person, firm or concern.

The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of the Commission.

Name: [undersigned name]

Job Title: [Job Title]

Employer: [Employer]

Business Address: [Business Address]

Date: [date attachment signed]

[Signature]

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